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Christina Brooks Whitman

EMPHASIZING THE CONSTITUTIONAL IN CONSTITUTIONAL TORTS

CHRISTINA BROOKS WHITMAN*

It has been surprisingly difficult to extricate constitutional litigation from torts. In this Article I would like to resist once more[1] the idea that tort doctrines and tort categories provide a useful model for constitutional decision-making. When it comes to deciding the merits of a constitutional claim, torts is a distraction. That is the case whether torts serves as a positive model for the constitutional cause of action or as an alternative to be shunned. As part of this argument, I also question the claim[2] that *Monroe v. Pape*,[3] the 1961 case that opened the door for damages relief under 42 U.S.C. § 1983,[4] was the source of a new and unprecedented substantive understanding of constitutional rights.

The danger posed by focusing on the way in which § 1983 damage actions against state officials, and parallel *Bivens*-actions against federal officials,[5] are like or unlike tort actions is that problems raised by specific remedies will drive thinking about constitutional substance. This has been a recurring source of confusion in the opinions of both the Supreme Court and the lower federal courts, and it ought not be encouraged.

Part of the problem is the very effort to distinguish constitutional law from torts. Over twenty years ago, in *Paul v. Davis*,[6] the Supreme Court tried to draw a bright line between the two. The plaintiff in *Paul* had been branded as an "Active Shoplifter[ ]" in a flyer circu-

* The University of Michigan School of Law

1. I have made related arguments in Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980), and Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986). *See also* Sheldon Nahmod, *Section 1983 Discourse: The Move From Constitution to Tort*, 77 GEO. L.J. 1719 (1989).

2. *See* Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617 (1997).

3. 365 U.S. 167 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (overruling *Monroe*'s holding that cities were not persons subject to § 1983 liability).

4. Section 1983 provides that everyone who acts "under color of [state] law" and deprives another of a federal right "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. A decade after *Monroe*, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized that damages actions could be brought against federal officers who violate constitutional rights.

6. 424 U.S. 693 (1976).

lated by defendant local law enforcement authorities.[7] The Court held that plaintiff's allegations would not support a constitutional cause of action because they "would appear to state a classical claim for defamation" under state tort law.[8] This ruling was not a simple matter of jurisdictional line-drawing or remedial allocation. In *Paul*, the Court reached the merits of the plaintiff's claim and decided a question of constitutional substance on the basis of a theory defended wholly on the grounds that it maintained the purity of the separate categories, constitution and tort. The Court held that the plaintiff's claimed interest in preserving his reputation from unsubstantiated allegations of criminal conduct was not of constitutional stature *because* it was an interest that might be vindicated through tort.[9] This was not a decision that freed constitutional substance from tort; instead, it was driven by tort. Questions of tort law, although they were addressed very superficially,[10] were essential to the decision of the case because they defined the limits of constitutional protection.

Paul was an ominous beginning. Maintaining the line between constitutional law and tort has not been as easy as the Court had hoped. The relationship is complex, particularly when plaintiffs seek damage relief for government misconduct. In constitutional tort actions, courts and Court-observers are still searching for a formula that will make the line clear. Perhaps it should come as no surprise that the attempts have ironic parallels in the efforts to bring coherence to the chaotic field of torts. For example, even when tort principles are not urged as rules of decision for constitutional damage actions,[11] such

7. *See id.* at 695.

8. *Id.* at 697.

9. *See id.* at 697-98.

10. For example, Chief Justice Rehnquist seems to have assumed that the plaintiff not only should have, but could have, pursued his grievance through a tort action brought in state court. However, Kentucky, like other states, gives its officials extensive immunities from tort liability. *See* Note, *Reputation, Stigma, and Section 1983: The Lessons of* Paul v. Davis, 30 STAN. L. REV. 191, 204-05 n.88 (1977).

11. It has been some time since *Baker v. McCollan*, 443 U.S. 137 (1979), made it clear that proof of the elements of a common law case is not sufficient to make out a constitutional claim. What § 1983 requires is that the plaintiff establish (a) that the defendant was acting under color of state law in (b) depriving the plaintiff of a constitutional right. *See id.* at 140. It is rare today to see cases like *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969), in which the court never identifies nor explicitly discusses constitutional requirements but relies instead on tort precedent to decide whether a sheriff can be held liable under § 1983 for failing to release a prisoner when the indictments against him were dismissed.

Courts seem to understand now that a § 1983 case cannot be stated merely by reference to tort. But the common law is not only insufficient; it is irrelevant unless referred to by the specific constitutional provision upon which the plaintiff relies. Yet courts still talk about a "cause of action for false arrest under § 1983" and about claims for false imprisonment, as if the § 1983 case were made by proving the existence of a common law tort *and* a violation of the Constitu-

actions are occasionally treated as if they constituted a closed category of constitutional litigation distinct from other claims of constitutional protection, a category that calls for special substantive, as well as distinctive, remedial rules.[12] This effort is reminiscent of the occasional, and perennially unsuccessful, quest to articulate a unified theory of torts.[13] Although they often draw on concepts developed in torts, these attempts to define a common thread seem, like *Paul*, to be motivated by a desire to delimit by some talismanic formula what is for torts and what is for constitutional law. Another example: In recent cases the Court has tended to analyze constitutional claims with a rigid adherence to discrete, nonoverlapping categories of constitutional rights. This practice seems to be motivated by the same desire to draw clear lines, but here the lines are drawn among constitutional claims rather than between Constitution and tort. The rigidity of the doctrinal categories most recalls the days of the writ system when it was essential to distinguish firmly between trespass and case. This approach may appeal to the Court because it appears to confine judicial decision-making, and avoids the risk of open-ended liability that seems to be associated by some Justices with the development of negligence.[14] In neither case is constitutional decision making truly independent of the analogy from tort.

In what follows, I begin by addressing the claim that *Monroe* initiated a new category of constitutional substance, focusing in Part I on *Monroe* itself and in Part II on some of the ways in which the case can be said to have opened the door to new, uniquely tort-like actions. In Part III, I briefly lay out what can and cannot be said in support of the overlap between constitutional law and torts. I address in Part IV the unsatisfactory efforts that have been made to limit the reach of the Constitution in the name of maintaining a line between constitutional cases and ordinary torts. I conclude in Part V with an exploration of liability for mistakes.

tion. *See, e.g.*, Brown v. Board of Commr's of Bryan County, 67 F.3d 1174, 1180 (5th Cir. 1995), *cert. granted*, — U.S. —, 134 L. Ed. 2d 645 (1996). Proof of a violation of the Constitution ought to be both necessary and sufficient, given the existence of state action.

12. *See, e.g.*, Wells, *supra* note 2, at 618.

13. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUDIES 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); *see also* OLIVER WENDELL HOLMES, THE COMMON LAW (1881).

14. The earliest articulation of this is by Chief Justice Rehnquist in *Paul*, 424 U.S. at 698. *See also, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986).

I

One way to enter this problem is to think about the significance of the Court's 1961 decision in *Monroe v. Pape.* It is conventional, and correct, to describe *Monroe* as clearing the way for the striking increase in § 1983 litigation that has occurred over the past thirty-five years. *Monroe* held that victims of official government misconduct could sue in federal court even when state tort remedies were available and, in doing so, made it possible to use federal damage actions against lawless officials to vindicate constitutional rights.[15]

Prof. Michael Wells proposes that *Monroe* made possible a new category of backward-looking substantive constitutional law.[16] Prior to that decision, affirmative challenges by private persons to state and local government conduct were commonly raised through suits for injunctive relief.[17] These actions, which were brought to halt or modify official conduct, necessarily asked the courts to evaluate the constitutionality of ongoing government policies and practices. Completed past actions do not support a request for forward-looking relief, but past actions can be brought before a court when a litigant has the right to seek compensation. By recognizing damage actions, Wells argues, the Court created, for the first time, an incentive to "conceive of past, tort-like harms in constitutional terms."[18]

To make the claim that *Monroe* introduced something strikingly new, Prof. Wells has to define the new category quite narrowly, as dealing with "an injury that took place in the past and . . . had no bearing on any other legal obligation owed by or to the victim."[19] The very narrowness of the definition points to the problem with Prof. Wells' claim: the federal courts were already involved in assessing the constitutionality of completed official conduct in several categories of cases. Substantively, constitutional law was already looking backward as well as forward.

15. Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978). The doctrinal holding that made this possible involved the interpretation of the statutory phrase "under color of [state] law." Before *Monroe*, it had been assumed that only officers acting pursuant to state policy, formal or informal, could be sued under §1983. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §8.3, at 430 (2d ed. 1994).

16. Wells, *supra* note 2, at 620. *Monroe*, *Bivens*, and related cases "had the effect of opening up a whole new field of substantive constitutional litigation."

17. Using suits for injunctive relief against state officials as a means of raising constitutional challenges to government policies had been the primary affirmative remedy since *Ex parte Young*, 209 U.S. 123 (1908).

18. Wells, *supra* note 2, at 620.

19. *Id.*

Although before *Monroe* most private litigants who sought to use the federal courts to define constitutional standards governing official conduct asked for forward-looking relief, the alleged injury often took place in the past as well as in the present. Standing to seek injunctive relief against ongoing government policies is easiest to establish when the plaintiff has been the victim of past misconduct,[20] and litigants who want to contest established but unarticulated official practices rather than explicit policies must demonstrate the existence of many specific past incidents in order to persuade the courts that a pattern exists.[21] The other ways in which constitutional questions were commonly raised before *Monroe v. Pape* even more clearly required courts to make after-the-fact judgments about official behavior. Challenges to government treatment of citizens could be raised as defenses in criminal cases[22] or as responses to assertions of governmental immunity defenses in civil cases,[23] or affirmatively in the prosecution of state and local officials under federal criminal civil rights laws.[24]

Although in most of these cases, as Prof. Wells says, the litigant could raise his or her constitutional claim only because it affected "other legal obligation[s] owed by or to the victim,"[25] the federal courts were clearly in the business of applying constitutional standards to completed official conduct long before *Monroe* was decided. Wells tries to avoid this point by defining the category with which he is concerned even more narrowly—as limited to "personal injury-based claims that resemble common law torts and may not be litigated in constitutional terms except by means of a suit for damages."[26] Not only does this characterization ignore the remote but genuine possibility of a federal criminal prosecution,[27] it is precisely through this move

20. Past injury is not enough, however. The plaintiff must also demonstrate that the injury he or she suffers is traceable to the defendant's conduct and is likely to be remedied by the requested relief. *See e.g.*, Allen v. Wright, 468 U.S. 737 (1984); Los Angeles v. Lyons, 461 U.S. 95 (1983). Plaintiffs who have suffered no past injury may be able to establish standing by proof that they are in real and immediate danger of injury. *See* United States v. Students Challenging Regulatory Agency Procedures ("SCRAP"), 412 U.S. 669 (1973).

21. For an egregious example of the difficulty the requirement may pose, see Rizzo v. Goode, 423 U.S. 362 (1976).

22. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Miranda v. Arizona, 384 U.S. 436 (1966).

23. This method of challenging government action has ancient roots, going back to English cases such as *Entick v. Carrington*, 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (K.B. 1765).

24. *See, e.g.*, Abbate v. United States, 359 U.S. 187 (1959); Screws v. United States, 325 U.S. 91 (1945).

25. Wells, *supra* note 2 at 620.

26. *Id.*

27. *See infra* text accompanying notes 57-60 (discussing *Screws*).

that, despite his disclaimers,[28] the analogy to tort becomes central to Wells' analysis.

To the extent that *Monroe* was a transition case, it was a transition to a new, additional remedy. That is apparent on the face of the opinion. The substantive constitutional questions raised in *Monroe* were no different from those that had been faced routinely by the Supreme Court in its review of state and federal criminal convictions. The *Monroe* plaintiffs challenged the actions of thirteen Chicago police officers who had broken into their home in the middle of the night, conducted a humiliating and destructive search of the premises, and subsequently detained the male, adult plaintiff for ten hours without taking him before a magistrate or allowing him to phone an attorney.[29] If any of the plaintiffs had been charged with a crime on the basis of a confession elicited during the detention or evidence discovered during the search, their constitutional complaints could have been brought before the state courts through a motion to suppress and, if necessary, before the United States Supreme Court on appeal of a conviction.

The ultimate substantive question—whether the actions of the police violated constitutional norms—ought to be no different because plaintiffs' claims came to the Supreme Court as a request for damage relief. Similar fact situations were standard fare in Fourth and Fifth Amendment challenges to criminal convictions.[30] The state's failure to initiate a criminal charge against Monroe foreclosed this customary vehicle for arguing that government officials had gone too far. Similarly, even before *Monroe*, a plaintiff who could establish that the Chicago police were engaging in an ongoing pattern of discrimination or harassment could have, at least in theory, sought a federal injunction against future action of the same kind.[31] In the action for compensatory relief that *Monroe* permitted, the fact that no conviction was sought might reduce the amount of damages suffered by the plaintiffs. However, the Court made no suggestion that the remedial context would affect substantive standards used to evaluate the police officers' behavior. *Monroe* acknowledged a new remedy. It did

28. Wells, *supra* note 2, at 646-47.

29. Monroe v. Pape, 365 U.S. 167, 168-69 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

30. *See e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

31. *But see* Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

not make newly unconstitutional actions that had previously been permitted.

Of course, a new remedy raises new remedial questions. Requests for damages relief raise unique issues concerning the link between the plaintiff's injury and the defendant's wrongdoing. These require the courts to ask, perhaps using language of causation and duty or obligation, whether the defendant is the appropriate source of funds to compensate the plaintiff. Even when these questions are answered affirmatively, there may be reasons to protect the defendant's resources through grants of immunity. Where relief is granted, the courts must determine the appropriate measurement of damages. These questions arise for the first time after *Monroe*, but they do not go to the standards for official conduct.

I do not intend to dismiss the dramatic practical impact of *Monroe*. By recognizing an action for damages, *Monroe* created a new incentive to sue and made constitutional litigation available to a new class of claimants. Previously, the only people who could even attempt to challenge government action in court were those who were subject to continuing government control, either through government-initiated litigation such as criminal prosecutions or through ongoing conduct of the sort that would support a request for injunctive relief. By expanding both the incentives to sue and the potential plaintiff class, *Monroe* made a tremendous difference in the number and variety of constitutional actions. What I want to resist is the suggestion that *Monroe* and its descendants ought to be seen as the vehicle for rethinking the substance of constitutional law.

II

The possibility that materialized in *Monroe*—that significant monetary recovery could be sought by victims of isolated and completed past government acts—seemed to call for new substantive rules because the cases now permitted looked superficially like ordinary actions brought in torts. This created anxiety about what distinguished constitutional law from torts. Prof. Wells' characterization captures this worry. He sees post-*Monroe* damage actions as a single substantive category of suits that might be brought interchangeably in tort or in constitutional law.[32] Some early courts even assumed that existing tort rules ought to govern the disposition of cases that mirrored ex-

32. Wells, *supra* note 2, at 617-18.

isting intentional torts.[33] The Supreme Court's worry about the overlap between Constitution and tort has taken several different forms. Some cases express the fear that *Monroe* has opened the door to the sort of the open-ended liability for mistakes that is found in negligence law;[34] others are concerned that governments will be held liable for the acts of rogue officials.[35] Both are troubling possibilities because they threaten to drain fiscal resources to compensate for events that even conscientious officials cannot perfectly control. Yet, in none of the salient respects—protection of personal security, redress for official mistake, applying constitutional standards to unauthorized conduct—is *Monroe* discontinuous with prior law. Care must be taken to ensure that attempts to limit *Monroe* do not limit other remedies as well because the case cannot be treated as substantively unique.

Prof. Wells is certainly not the first commentator to describe *Monroe* as creating a new category of cases.[36] However, his characterization of that category as encompassing cases that straddle the boundary between constitution and tort[37] may make it most obvious why the Supreme Court has wanted to restrict constitutional damages actions out of a fear that the new category they allegedly create will make § 1983 a "font of tort law."[38] Wells argues that *Monroe* defines a new category of constitutional actions that could *as easily* be brought in tort because they seek compensation for invasions of personal security that are protected by the common law.[39] The key to this characterization of the category is the nature of the injury inflicted.

33. *See supra* note 11.

34. *See, e.g.*, DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989); Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986); Parratt v. Taylor, 451 U.S. 527, 546 (1981) (Powell, J., concurring in the result), *overruled in part by* Daniels v. Williams, 474 U.S. 327 (1986) (overruling *Parratt*'s holding that negligence is sufficient for procedural due process).

35. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517 (1984); *Parratt*, 451 U.S. 527; Monell v. Department of Soc. Servs., 436 U.S. 658 (1978). *See also* Susan Bandes, Monell, Parratt, Daniels *and* Davidson: *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101 (1986).

36. For influential early writing, see Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 2532 (1972) (discussing *Bivens*), and Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965).

37. Wells, *supra* note 2, at 619. "Boundary cases" refer to those that are based upon "harms that may be litigated in common law tort actions such as battery or defamation, yet may also give rise to constitutional tort liability when the defendant is a government officer." *Id.* at 619 n.7.

38. Paul v. Davis, 424 U.S. 693, 701 (1976).

39. Therefore an important case for Prof. Wells is Ingraham v. Wright, 430 U.S. 651 (1977), which he describes as standing for the proposition that "constitutional tort reaches all the interests protected by common law," Wells, *supra* note 2, at 618, because it defines "personal security as an aspect of the 'liberty' protected by the due process clause of the Fourteenth Amendment." *Id.* at 622.

Putting aside the question whether a comparable tort action is really available given the existence in many states of sovereign immunity doctrines that protect government officials from being subject to tort liability on the same terms as private citizens,[40] it is true that many unconstitutional acts do damage by causing physical and emotional injuries of the sort traditionally protected by tort law.[41] Unlike many personal injury actions, however, constitutional wrongs are not only, or even primarily, subject to legal sanction because of the character of the injuries they inflict. It might be closest to the truth to say that constitutional damage actions are like the classic intentional torts that protect the dignity of the person of the plaintiff by specifying limits on the defendant's potentially intrusive conduct.[42] The focus of the intentional tort claim is on the defendant's harmful or offensive conduct, and the injury to the plaintiff may be merely dignitary, or even nominal.[43] Even that analogy fails to capture the essence of constitutional wrongs, which are defined with reference to the unique power that government has over those subject to its jurisdiction. In constitutional cases, although the plaintiff must establish injury, the substantive heart of the case is the special power of the government to do harm, rather than the quality of the plaintiff's injury.

Monroe also expanded the reach of substantive constitutional law by making it easier to argue that constitutional rights have been violated by a government officer's mistake.[44] Injunctive actions, by and large,[45] are addressed to deliberate policy. They challenge ongoing conduct, which would presumably have been modified upon request if it were based on mistake. Damage actions, in contrast, do not disappear upon correction of erroneous behavior; the claim for compensation accrues once the damage is done, and the claim continues to be ripe until compensation is paid. Since the accidental injuries that underlie so much of tort law can often be said to result from mistakes, in the sense that they would have been avoided had they been precisely

40. *See* W. PAGE KEETON ET AL, PROSSER AND KEETON ON TORTS §132, at 1056-69 (5th ed. 1984).

41. Excessive force claims are a clear example; they look like the intentional torts of assault and battery. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985). Another, which resembles medical malpractice, is the action for egregiously inadequate medical care of a prison inmate which was the subject of suit in *Estelle v. Gamble*, 429 U.S. 97 (1976).

42. *See* KEETON ET AL, *supra* note 40, chapters 2-3.

43. CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS §1, at 23-24 (2d ed. 1980).

44. I return to this problem *infra* at pp. 688-92.

45. Some suits for structural relief, particularly challenges to conditions in prisons and mental institutions, seek to require affirmative steps to eliminate conditions that are due to limited resources or to neglect rather than deliberate policy.

foreseen, this is another way in which *Monroe* appears to have moved constitutional litigation closer to tort. Indeed, Chief Justice Rehnquist's concern in *Paul v. Davis*[46] that constitutional litigation might collapse into tort is expressed in precisely these terms. *Paul* itself involved deliberate official action—the publication of a flyer that contained names and photos of "Shoplifters" and included a picture of the plaintiff, who had never been convicted of that crime.[47] But Chief Justice Rehnquist was worried even then that failure to draw a clear line between constitutional cases and tort cases would open the federal courts to the whole range of tort actions, including those based on accidental injuries.[48] Among the consequences he feared was the possibility that a claim would be brought by "[a]n innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle."[49]

By authorizing damage actions against officials for their past behavior, *Monroe* did make it possible for plaintiffs who had been accidentally injured by official conduct to take their grievances to court even when there was no threat of continuing or future injury.[50] This was not previously possible in an injunctive action, for the reasons described above, or in a criminal action against the officers, for that has stringent mens rea constraints.[51] But even before *Monroe*, the Court had frequent occasion to recognize constitutional error in official mistakes. That was most obviously the case when constitutional violations were raised as defenses to criminal prosecutions. Often the police behavior challenged in that context was deliberate, but it could also be accidental—a misreading of what a suspect had understood, a confusion about consent or about addresses, even a clerical error in entering data. Prophylactic constitutional rules, such as the warning required by *Miranda v. Arizona*,[52] not only deterred deliberate official misconduct, but also made it less likely that officials would inadvertently misinform suspects of the scope of their constitutional rights. It is erroneous, then, to see *Monroe* as initiating constitutional inquiry into official mistake.

Even more clearly, *Monroe* did not introduce for the first time the possibility that the Constitution would be concerned with random

46. 424 U.S. 693 (1976).
47. *Id.* at 695.
48. *See id.* at 698-99.
49. *Id.* at 698.
50. *See* Dellinger, *supra* note 36.
51. *See* Screws v. United States, 325 U.S. 91, 101 (1945).
52. 384 U.S. 436 (1966).

and unauthorized conduct by individual government officers. Again, many of the most prominent criminal procedure cases can be described in those terms. *Monroe* itself, even though it involved thirteen policemen, could be described as an egregious case of random and unauthorized misconduct. That was, in essence, the state's argument, which took the doctrinal form of a claim that the officers' actions, because they violated Illinois law, were not "under color of [state] law" as required by §1983.[53] The bulk of the Supreme Court's opinion was addressed to rejecting that argument on the grounds that Congress, fearing that state legal protections might exist in theory but not in fact, had intended to reach even unauthorized official conduct.[54] This holding forms the key affirmative conclusion of the *Monroe* opinion,[55] a fact that may have contributed to the impression that extending the reach of the Constitution to unauthorized official conduct was the major advance made by the decision.

Yet, that extension was remarkable only in its application to damage actions. *Monroe* made possible a new remedy, not a new sort of unconstitutionality. Injunctive actions against unauthorized official conduct had long been available. Standing and proof problems could be insurmountable barriers even if suit were brought in a location where official lawlessness was widespread and targeted at a specific population.[56] But that aside—if a court could have been persuaded that these Chicago policemen would come back to harass Mr. Monroe and his family again—the conduct at issue in the case ought to have justified the issuance of an injunction. Officials who engaged in egregious unauthorized conduct could also be prosecuted prior to *Monroe* under federal criminal statutes such as 18 U.S.C. § 242. That had been established sixteen years earlier in *Screws v. United States*,[57] an infamous example of unauthorized police misconduct. *Screws* involved the criminal prosecution under federal civil rights law of a Georgia sheriff, who, with the assistance of a policeman and a special deputy, arrested an African-American man on the charge of stealing a tire.[58]

53. *See* Monroe v. Pape, 365 U.S. 167, 172 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

54. *See id.* at 174.

55. The Court also ruled that the City of Chicago could not be sued under §1983 because the legislative history indicated that Congress had not intended to make municipalities liable under the statute. *Id.* at 187-92. That holding was reversed in *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

56. *See* Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

57. 325 U.S. 91 (1945).

58. *Id.* at 92.

At the door of the courthouse the officers beat the handcuffed suspect to death.[59] The majority of the Supreme Court, reviewing the conviction of the officers, rejected the defendants' claim that such flagrantly illegal behavior could not be said to have occurred "under color of [state] law."[60]

This history is well-known. I rehearse it to make a point that tends to be slighted: Because *Monroe* did not create a new substantive category of constitutional law governing the conduct of government officials, substantive (as opposed to remedial) decisions in § 1983 cases have implications for the entire range of constitutional decisionmaking. It is important that fears about the extent of remedies are not articulated as limitations on constitutional rights, with unexplored consequences on the entire range of possible actions.[61] This can be a difficult principle to keep in mind. Even judges who are sensitive to remedial context can slip into language that seems to have substantive implications.

An example of this phenomenon can be found in the Court of Appeals decision *United States v. Lanier*.[62] *Lanier* involved an appeal to the Court of Appeals for the Sixth Circuit brought by a state judge who had been convicted under 18 U.S.C. § 242 for coercing women who were litigants, court employees, or who otherwise had business with his court into performing sexual acts.[63] On the face of it, *Lanier* looks like an appropriate case for federal prosecution. There were reasons to doubt that the state criminal justice system would deal effectively with the problem: the defendant was from a locally prominent family in a rural county; he had previously served as alderman and mayor of the city; and his brother was the local prosecutor.[64] Despite the cumulative evidence of appalling sexual misconduct, the conviction was reversed on the ground that the federal prosecutors had not established that Judge Lanier had violated a constitutional right that had been specifically articulated by Supreme Court decisions at

59. *See id.* at 92-93.

60. *See id.* at 107-113.

61. "The protections of the Constitution do not change according to the procedural context in which they are enforced—whether the allegation that constitutional rights have been transgressed is raised in a civil action or in a criminal prosecution, they are the same constitutional rights." United States v. Reese, 2 F.3d 870, 884 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 928 (1994).

62. 73 F.3d 1380 (6th Cir. 1996).

63. *Id.* at 1383-84, 1397.

64. *See id.* at 1394, 1403, 1405.

the time he engaged in the challenged acts.[65] As the majority clearly understood, this requirement was unique to the imposition of criminal sanctions for it was responsive to the need to give fair notice to potential criminal defendants.[66] Whatever the merits of the decision as a criminal matter,[67] the case is also troubling for what it suggests about the reach of the Constitution generally. In making the point that a substantive due process right to be free from sexual coercion by a judge had not been made sufficiently specific, the Court of Appeals occasionally spoke in terms that cast doubt on principles of constitutional substance that had been generally accepted and thereby suggested that no constitutional rights had been violated at all.[68] One principle undercut by the opinion was the Supreme Court's statement in *Ingraham v. Wright*[69] upon which Prof. Wells puts so much

65. *See id.* at 1393-94. This holding was reversed in *United States v. Lanier*, 117 S. Ct. 1219 (1997).

66. The Court of Appeals was applying the decision in *Screws*, which upheld § 242 against a charge of vagueness by construing it to apply only to those situations in which the state establishes "a specific intent to deprive a person of a federal right made definite by decision." Screws v. United States, 325 U.S. 91, 103 (1945) (plurality opinion).

The Court in *Lanier* distinguished between constitutional rights that could be vindicated through § 242 and those that could be remedied through civil law. 73 F.3d at 1387. It said that the former might be a small subset of the latter because Congress had not intended to criminalize all constitutional violations:

> Congress does not evidence in § 242 a deliberate intent to create an evolving criminal law which expands to include new constitutional rights as they become a part of our civil constitutional law.

Id.

The requirement that a constitutional right have been made specific before it can be the basis of sanctions imposed on an individual official has a civil counterpart in the qualified immunity defense. The immunity bars suits against officials in their individual capacity unless they violate constitutional rights that are clearly established at the time of the acts being challenged. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982). Presumably this defense would make it difficult for Judge Lanier's victims to proceed against him for damages. The Supreme Court's decision in *Lanier* held that the *Screws* notice requirement and the civil "clearly established" qualified immunity tests are essentially the same. 117 S. Ct. at 1227-28.

67. The Court of Appeals for the Sixth Circuit was troubled that there had been no Supreme Court opinion interpreting the "right to bodily integrity" arguably protected by substantive due process to encompass sexual misconduct. *Lanier*, 73 F.3d at 1388. Yet the extortion of sexual "favors" by a judge who threatens his victims with loss of a job or loss of custody of a child, both raised by the evidence in the case, seems undeniably to be abuse of government power. Would *Screws* have been decided the other way, would the conviction have been reversed, if the law enforcement officers prosecuted there had raped the person in custody rather than beating him? The Court in *Lanier* required a Supreme Court decision before a right could be made the basis of a § 242 prosecution, but some issues never come before the Supreme Court because they are not sufficiently controversial to justify the expenses of appeal.

The Sixth Circuit distinguished *Screws* on the grounds that it raised issues of equal protection and procedural due process, neither of which were relied on by the prosecution in *Lanier*. *Id.* at 1393-94.

68. *See id.* at 1388-89.

69. 430 U.S. 651, 673 (1977).

weight,[70] the statement that the Due Process Clause protects against "unjustified intrusions on personal security." The Court of Appeals described it as merely "dicta."[71] And the Sixth Circuit opinion also questioned whether, if any such protection did exist, it would include a right to be free from sexual assault.[72]

If the line between limits on remedies and limits on constitutional substance can be so easily blurred in a criminal context, where constraints on judicial sanctions are taken most seriously, the risks that something similar will happen in suits for damages is apparent. In criminal cases, remedies are confined because of our fears of government overreaching when personal liberty is at stake. The dangers in the civil context are not so pressing. It is true that the years since *Monroe* have seen an unprecedented expansion of civil rights litigation under § 1983.[73] Much of that litigation involves suits for damages, and some of the most troubling § 1983 cases look like they are "really" tort cases because they seek damages for aberrational misconduct by individual officers. Yet, efforts to contain this growth by narrow interpretations of substantive constitutional rights cannot be confined to suits for damages. They have implications for other contexts. If the Constitution is held to be inapplicable where official misconduct looks too much like the subject of tort, other remedies will be foreclosed as well. Consider *Screws*, for example. If the victim had survived and sued for damages, *Screws* would look like an ordinary intentional tort case—a battery action with elements of false imprisonment. Because the defendants were local law enforcement officials, it is also a classic example of the abuse of official power.

III

If *Monroe* is seen as merely creating a new remedy, what sense is to be made of the apparent overlap between constitutional damage actions and torts? Tort concepts cannot be completely excised from § 1983 decisions. We lack another language in which to discuss what it means to say that one person (or institution) has injured another per-

70. Wells, *supra* note 2, at 631-35.

71. *See Lanier*, 73 F.3d at 1388.

72. *See id.* at 1388.

73. For data on the growth of § 1983 litigation, as well as careful commentary as to the data's significance, see Theodore Eisenberg & Stewart J. Schwab, *The Reality of Consitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987); Theodore Eisenberg & Stewart Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989); Stewart J. Schwab & Theodore Eisenberg, *Explaining Consitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988).

son in such a way that it is appropriate to require him to pay compensation. But in constitutional cases, the person who is said to have wronged another is by definition someone who has a special power to do harm because of his government position. Because the government is implicated, the nature of the inquiry is affected.

Personal injury claims, claims of dignitary injuries, and claims of loss of property sound like the business of tort law. Chief Justice Rehnquist's flirtation in *Paul v. Davis* with the idea that constitutional injuries are, by definition, those that cannot be redressed in tort,[74] would, if taken seriously, exclude all claims of this sort. Yet, the facts of *Paul* indicate that the categories are not really collapsed even if relief is available in both contexts. The plaintiff in *Paul* alleged that local law enforcement authorities had publicly and falsely declared him to be a shoplifter.[75] Rehnquist characterized this claim as one of injury to reputation, which therefore seemed to him to sound in defamation rather than constitutional law.[76] Yet, the government's involvement presents an alternative characterization which Rehnquist ignored: The plaintiff had been deprived of his right to a trial before being officially branded as a criminal. Viewed in this light, *Paul* is comparable to *Screws*, if much less egregious.

The division between tort and constitutional law that Chief Justice Rehnquist proposes in *Paul*, which could be described as a new version of the nineteenth century attempt to designate mutually exclusive separate spheres of state and federal authority,[77] may have seemed appealing and appropriate to him because the case involved reputation, an almost-dignitary injury[78] not protected in express terms by any clause in the Constitution. Perhaps dignitary injuries seemed more elusive, less pressing. Perhaps they seemed to be a poor fit with the "life, liberty, and property" language in the Due Process Clause. But that very language makes it apparent that a "separate spheres" strategy will not work. Since tort doctrine vindicates injuries to "property" and to "life," both of which are expressly reached by the Constitution, some overlap is inevitable. Some deprivations of property and liberty by government actors will raise constitutional ques-

74. *See* Paul v. Davis, 424 U.S. 693, 697-98 (1976).

75. *See id.* at 695-96.

76. *See id.* at 697, 701.

77. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542, 550 (1876).

78. Defamation is a dignitary harm in that it is defined as a statement that "tends. . .to harm the reputation of another," RESTATEMENT (SECOND) OF TORTS § 559 (1977), and, unless special rules apply, does not require any demonstration that actual injury has occurred. But Chief Justice Rehnquist is correct that the gist of the action at common law was injury to reputation.

tions, and similar losses caused by private actors may fall easily under torts. In fact, the Court has, in other contexts, felt quite comfortable about this. The Justices have seemed, for example, to be most confident about the breadth of protection available under the Due Process Clause when its language is interpreted with reference to the common law.[79] And, as Prof. Wells points out,[80] the year after *Paul*, in *Ingraham v. Wright*,[81] the Court interpreted the Clause's reference to "liberty" to encompass the interests in personal security defined by the common law of tort.

Yet it is error in the other direction to stress too much the overlap between constitutional wrongs and torts. A constitutional claim cannot be made out by proof that an official has committed a common law tort.[82] Despite some early cases to the contrary,[83] that much now seems clear. But even foregrounding what is shared, the way in which both can be used to vindicate interests in "personal security" can be misleading, for it diverts attention from the most important task of constitutional litigation, the setting of standards for official behavior.

Many, perhaps most, unconstitutional acts are problematic even though they pose no threat to property or risk of physical harm. Some examples, such as First Amendment violations and infringements on equal protection, are obvious. This is the affirmative significance of the familiar point that procedural due process protections do not guarantee a correct result. What is guaranteed is fair process; the loss of that may occur even when there is no injury that is tangible in a monetary or physical sense.

Limitations on remedies, both compensatory and prospective, may constrain the vindication of these less tangible interests in individual cases—perhaps by requiring that some showing of significant injury be made before a remedy will be awarded.[84] But these considerations ought not affect the underlying question of whether the government officials have acted unconstitutionally. One of the purposes of § 1983 is to provide compensation for the individual victims of official action,[85] but redress for victims could be provided by a variety of

79. *See e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (opinion of Scalia, J.); Board of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pennoyer v. Neff, 95 U.S. (5 Otto) 714 (1877).

80. Wells, *supra* note 2, at 618.

81. *See* Ingraham v. Wright, 430 U.S. 651, 673 (1977).

82. *See supra* note 11.

83. *See e.g.*, Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968).

84. *See* Carey v. Piphus, 435 U.S. 247 (1978).

85. *See id.* at 253-54.

mechanisms, including government-funded welfare and insurance schemes. The more essential function of constitutional litigation, from the perspective of society as a whole, is that it is a mechanism for setting minimum standards for official behavior when democratic and administrative safeguards fail.

In negligence, where proof of injury is essential to stating the cause of action, we leave much to private discretion. Actors who engage in risky activities are permitted to take the chance that their conduct will cause no injury. If they bet correctly, no sanctions will be imposed because no action can be stated. And if they do cause harm, they are required only to compensate for the loss. Society has more of a stake in constitutional behavior by officials. This is the sense in which the closest torts analogy to constitutional litigation, and the one typically drawn, is to the intentional torts. Like constitutional law, intentional tort doctrine offers no general protection of personal security. Instead, it defines limits on defendants' behavior. This is not to say that intentional torts should serve as a guide or a template for defining constitutional actions, or that negligence should not. My point is, rather, that there is no easy fit between the two. Constitutional litigation has a different subject matter than torts, though both can redress invasions of personal security, because it is concerned uniquely with the limits on government behavior.

IV

If the distinction between torts and constitutional damage actions turns on the latter's focus on abuse of government power, both will naturally evolve in different directions because of their different substantive concerns. But the working out of these concerns takes time. It is tempting, then, to look for some way to draw the distinction quickly and clearly. In this Part I describe several attempts—some adopted by the Supreme Court and one suggested by Prof. Wells.

The post-*Monroe* growth in constitutional litigation has made the Supreme Court explicitly nervous about the implications of recognizing constitutional rights. The Court has been concerned about both the workload of the federal courts and the financial burden of litigation on state and local governments.[86] These concerns are not uniquely raised by damage actions, but they have special bite in cases that raise the possibility of substantial monetary recovery, especially if

86. *See e.g.*, Canton v. Harris, 489 U.S. 378, 391-92 (1989); Patsy v. Board of Regents, 457 U.S. 496, 533 (1982) (Powell, J., dissenting).

compensation must be paid for every mistake made by governmental officials that implicates constitutional interests. If the interests protected by the Due Process Clause are defined broadly, the potential for liability under that provision alone can be enormous.

One reaction on the part of the Court has been to construct immunity doctrines addressed specifically to the problems posed by actions for damages.[87] Whatever the merits of the specific contours of these doctrines,[88] limiting devices addressed directly to the damage remedy seem, in general, to be appropriate both as a way to control the potential financial burden on governments and as a device to reduce the incentive to sue.

Another response, which worries me more, is the reluctance on the part of the Court, a reluctance of increasing strength in the last decade, to acknowledge that the Constitution is implicated at all. So, thirty-five years after *Monroe*, § 1983 litigation has not given rise to an ongoing discussion, grounded in constitutional principle, on the appropriate limits of government, but has led instead to a system of constitutional litigation that is uncomfortably close to a modern version of the old forms of action, where the plaintiff must take care to fit his or her claim into one of the very narrow doctrinal categories that have been made available for use. A case can be lost because the litigant mistakes the nature of her claim and points to the wrong constitutional category. And, just as under the common law writs system,[89] the penalty of dismissal will be imposed even when the Justices themselves cannot agree on the proper pleading for the plaintiff's case.

An example of this phenomenon is *Albright v. Oliver*,[90] in which the Supreme Court affirmed the dismissal of a substantive due process claim brought by a plaintiff who alleged that the defendant police detective had issued a warrant for his arrest without probable cause.[91]

87. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635 (1987); Stump v. Sparkman, 435 U.S. 349 (1978).

88. For critical analyses of the qualified immunity for executive officers, *see, e.g.*, Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935 (1989); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989).

89. *See, e.g.*, Scott v. Shepherd, 2 Wm. Bl. 892, 96 Eng. Rep. 525 (1773).

90. 510 U.S. 266 (1994).

91. According to the plaintiff's allegations, the paid informant who told defendant that plaintiff had sold her cocaine gave little evidence of reliability. *See id.* at 293-93 (Stevens, J., dissenting). Over 50 prosecutions based on her accusations were aborted or dismissed. *See id.* In the incident that led to a warrant being issued for plaintiff's arrest she misidentified the alleged seller twice before defendant asked her if the seller could have been the plaintiff. *See id.* The "cocaine" allegedly sold by plaintiff turned out to be baking powder. *See id.* Plaintiff was then charged with "the sale of a substance which looked like an illegal drug." *Id.* at 268. The

There was no opinion of the Court. Four Justices, in an opinion by Chief Justice Rehnquist, said that the plaintiff erred in relying on substantive due process.[92] They thought he might have been able to state a claim under the Fourth Amendment but declined to reach that question because it had not been raised in the petition for certiorari.[93] Justice Souter agreed that the Fourth Amendment was the proper home for the plaintiff's claim.[94] He wanted to distance himself from the plurality's adoption of the view that the specific guarantees of the Bill of Rights exhaustively state the constitutional constraints on criminal procedure, but was willing to follow their lead in this case because he thought that the Court ought to be particularly reluctant to recognize claims based on substantive due process.[95] Justice Kennedy, joined by Justice Thomas, thought that substantive due process analysis was appropriate but did not support a ruling for the plaintiff on the facts of the case.[96] Justices Stevens and Blackmun dissented.[97] They would have held that the initiation of a criminal prosecution on the basis of extraordinarily weak evidence violated due process.[98]

The implications of this approach, which engages in a search for the single correct constitutional provision, can be seen in a Court of Appeals for the Seventh Circuit case which follows *Albright—Johnson v. Phelan*.[99] The plaintiff in *Johnson* challenged the constitutionality of the Cook County jail's routine practice of allowing female guards to monitor naked male prisoners in cells, showers and toilets.[100] The majority opinion written by Judge Easterbrook found the case relatively easy: although plaintiff stated his claim as one based on due process, "[o]bservation is a form of search," so it was appropriately analyzed under the Fourth Amendment rather than the Due Process Clause.[101] Unlike the Supreme Court in *Albright*, Judge Easterbrook went on to analyze the Fourth Amendment claim, but he found it wanting.[102] In *Hudson v. Palmer*,[103] a Fourth Amendment case that involved a

criminal case against him was dismissed on the ground that the charge did not state an offense under Illinois law.

92. *Albright*, 510 U.S. at 273, 275.
93. *See id.* at 275 n.7.
94. *See id.* at 288-90.
95. *See id.* at 287-89.
96. *See id.* at 286.
97. *See id.* at 291.
98. *See id.* at 297-98.
99. 69 F.3d 144 (7th Cir. 1995).
100. *Id.* at 145.
101. *Id.*
102. *See id.* at 145-46.
103. 468 U.S. 517 (1984).

guard's search of a prison cell and alleged confiscation of a prisoner's personal property, the Supreme Court had held that prisoners have no expectation of privacy.[104] Therefore, the plaintiff in *Johnson*, who was incarcerated pending trial, had no Fourth Amendment claim. Even if the Fourth Amendment had not been dispositive, Judge Easterbrook said, the Fifth Amendment Due Process Clause would not help the plaintiff because it has been interpreted to require deference to prison regulations "reasonably related to legitimate penological interests,"[105] and an Eighth Amendment claim would fail because "[a]ny practice allowed under the due process analysis is acceptable under the Eighth Amendment too."[106] Cross-sex monitoring of prisoners, Judge Easterbrook held, is "reasonable" because "it makes good use of the staff" and "reduces the need for prisons to make sex a criterion of employment."[107]

Judge Posner, dissenting, did not begin his analysis of the case by parsing through a string of constitutional provisions. Instead, he focused directly on what was being done to the prisoners.[108] Noting that Judge Easterbrook's analysis could apply just as smoothly to the surveillance of female prisoners by male guards, Judge Posner discussed the significance of the nudity taboo in American society.[109] He found the Supreme Court's narrow reading of the Fourth Amendment in *Hudson* to be inapposite because *Johnson* involved something more serious than the privacy expectation claimed in *Hudson*.[110] Judge Posner thought that the Cook County practice involved "the infliction of humiliation on prison inmates"[111] and, as such, was forbidden by the Eighth Amendment's prohibition on cruel and unusual punishments.[112] Under Judge Easterbrook's analysis, the various separate provisions of the Constitution become a series of traps for plaintiffs. Judge Posner began by focusing on the government practice, defined what was at stake for the prisoners[113] and then turned to the Constitu-

104. *See id.* at 526-30.
105. *Johnson*, 69 F.3d at 146 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).
106. *Id.* at 149.
107. *Id.* at 147.
108. *See id.* at 151-52.
109. *See id.* at 152.
110. *See id.* at 154.
111. *Id.* at 153.
112. *See id.*
113. One of the grounds for difference between Judge Easterbrook and Judge Posner was their dispute over what is necessary to serve the ends of gender equality. Judge Easterbrook argued that the prison practice of cross-sex surveillance serves Title VII purposes of promoting the employment of women as prison guards. *See id.* at 147-48. Judge Posner responded that compliance with a federal statute cannot be used to justify a violation of the Constitution. *See id.*

tion to see if the practice was forbidden. Judge Easterbook's opinion reads as if he is most concerned with clearing paper off his desk. By contrast, Judge Posner seems to have actually listened to what the plaintiff was describing.

The rigid categorization of claims seen in opinions like the plurality's in *Albright* and Judge Easterbrook's in *Johnson* works as a limiting device only because the individual constitutional provisions are defined very narrowly. The impulse to rein in the broader implications of *Monroe*, combined in some instances with what seems to be a misunderstanding of torts concepts, has led the Supreme Court, in a series of cases that have been widely criticized,[114] both to assume that tort law will provide protection in the "ordinary" case and to develop a set of limiting constructs that go beyond immunities and categorizations. If these were constraints uniquely on damages actions,[115] the effort to limit liability would be less troublesome, for the doctrines would function like immunities. However, all too often these limitations are articulated as interpretations of the scope of constitutional protections.

The assumption that adequate tort alternatives will be available to the plaintiff can have substantive bite. An early example is *Paul v. Davis*.[116] The Court began its opinion by saying that the plaintiff's "complaint would appear to state a classical claim for defamation actionable in the courts of virtually every state."[117] That became the

at 153-54. He associated the acceptance of cross-sex surveillance with "radical feminists" who would eliminate the "dicholomization of the 'sexes.'" *Id.* at 153. Neither judge responded to a more likely feminist argument which would distinguish between the surveillance of women by men and the surveillance of men by women on the ground that, in American society, these mean different things. It may be more humiliating for a woman to be observed by a man than for a man to be observed by a woman. If so, a gender-neutral approach to analyzing the case would be inappropriate.

114. For criticisms, see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991); Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659 (1990); Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 423-29 (1977); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 324-28 (1976).

115. Thus the requirement that plaintiffs who seek redress from governmental entities, as opposed to individual officials, establish that their injury flows from some "official policy or custom," Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978), does not fall into this category even though it imposes an additional requirement not present in tort. Superficially, the *Monell* requirement seems to require "something more" than tort in its rejection of respondeat superior liability. But it was derived by analysis of the legislative history underlying § 1983, rather than as a matter of constitutional interpretation. For that reason, it functions like an immunity, limiting certain actions under § 1983, but not affecting constitutional protections in other contexts. *See id.*

116. 424 U.S. at 693 (1976).

117. *Id.* at 697.

reason why the complaint did not state a claim under the Constitution. Yet, the very element that would make Davis' claim a constitutional case, the fact that the defendants were exercising official authority when they described him as a criminal, may well have barred the tort action on grounds of sovereign immunity.[118] A more careful, and more narrow, argument of the same sort was accepted in *Ingraham v. Wright*.[119] In that case state tort law was held to provide all the process that was due to students who had been subjected to severe corporal punishment in junior high school.[120] The possibility of tort recovery satisfied the majority of the Court even though a tort action, if it existed,[121] would focus on the reasonableness of the teacher's belief that punishment was appropriate rather than on the charge at the heart of the students' case: their argument that the beatings were excessive even if some punishment was justified.

In other cases, the Court, without much attention to the nuances of tort doctrine, has devised unprecedented, more stringent requirements of causation and duty for due process cases. In essence, these requirements treat constitutional cases as if they must be somehow more egregious or harder to establish than an ordinary tort. *Martinez v. California*[122] rejected an action brought against members of a parole board by the survivors of a young girl who was murdered by a parolee. Without reaching the question whether the parole board had acted unconstitutionally,[123] the Court held that the girl's death at the hands of the released prisoner "cannot be fairly characterized as state action."[124] Using tort language of proximate cause, the Court said that her death was too remote a consequence of the parole officers'

118. *See supra* note 10.

119. 430 U.S. 651 (1977).

120. *See id.* at 674-79.

121. The Court did inquire into the existence of a common-law tort remedy under Florida law. It decided to accept the views of the courts below and the concession of the petitioners that such a remedy existed even though there were no reported cases. *See id.* at 676-77 & n.45.

122. 444 U.S. 277 (1980).

123. *See id.* at 280. On the merits, the result may well have been correct. Although the complaint alleged that the parole decision was "reckless, willful, wanton, and malicious," *Id.* there was no indication that the decision to release the prisoner violated any substantive or procedural constitutional protections. *See id.* Failure to comply with state formalities does not make out a constitutional case, and due process requirements do not guarantee that *correct* decisions will be made. The plaintiffs could not argue that they had a right to appear before the board. Such a claim would make no sense because the specific victim was, obviously, not identifiable in advance. Indeed, the defendants themselves were charged to represent the public's (and thus the potential victims') interests. In the absence of some more specific allegation of constitutional error, plaintiffs did not make out a case of abuse of government power. *See id.* at 281-83.

124. *Id.* at 284.

action to hold them responsible.[125] To the extent that proximate cause reflects foreseeability, this seems an odd decision; the possibility of future criminal activity is one of the most important factors that parole decision makers are charged to consider. In similar situations, states have found officials liable for the negligent release of dangerous individuals.[126] *Martinez* used tort terms loosely in order to create an especially strict causation standard for constitutional cases.

In cases like *Martinez*, it seems odd to say that there was no causal connection between the parole decision and the subsequent murder, or that the parole officials ought not be asked to evaluate whether the risk of future criminal activity is high enough to warrant future incarceration. Arguments of this sort are even more difficult to make when the potential victim can be identified in advance.[127] Perhaps for that reason, nine years later when the Court was faced with a similar case in *DeShaney v. Winnebago County Department of Social Services*,[128] it chose to borrow tort concepts of duty, rather than causation, to limit government responsibility. *DeShaney* was a substantive due process case brought against county social services personnel who left the plaintiff child with his abusive father until the father inflicted a beating that left the child permanently and profoundly retarded. In rejecting government responsibility for the child's condition, the Court used the tort distinction between misfeasance and nonfeasance[129] as a means of interpreting the reach of Due Process:

> . . . the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.[130]

The Court recognized that tort law had departed from rigid adherence to the distinction to such a degree that most states would have im-

125. *See id.* at 285.

126. Although some states have required that the threatened victim be specifically identifiable in advance, *see, e.g.*, Thompson v. Alameda, 614 P.2d 728, 736 (Cal. 1980), others have imposed a duty to act or warn when the danger is more general. *See, e.g.*, Hamman v. Maricopa, 775 P.2d 1122, 1128-29 (Ariz. 1989). States may be more reluctant to impose duties to protect on governments than on private custodians. The torts cases rejecting liability are put in terms of duty, rather than causation, which draws attention to the policy basis of the decisions.

Note, too, that negligence law requires reasonable prudence (an appropriate weighing of costs and benefits), while substantive due process would in most cases be satisfied if there were a rational basis for the decision.

127. *Compare* Tarasoff v. Regents of Univ. of California, 551 P.2d 334 (Cal. 1976).

128. 489 U.S. 189, 201-02 (1989).

129. *See* CLARENCE MORRIS & C. ROBERT MORRIS, JR., *supra* note 43, at 127-28.

130. *DeShaney*, 489 U.S. at 203.

posed liability on a private defendant who ignored similar evidence of abuse.[131] As in *Martinez*, it would be odd to suggest that the social workers had no "duty" to consider whether the child was in grave danger in deciding if it would be appropriate to intervene. The Court's ruling that the state was not "responsible" for the harm to the child may be most easily understood as a decision about the responsibility to pay damages. Again, the problem was seen as one of drawing a line between constitution and tort. The Court was worried that "every tort committed by a state actor [would be transformed] into a constitutional violation."[132] It responded to that worry by creating an especially high standard of "duty" for constitutional cases.

When the Eighth Amendment is the relevant constitutional provision, the justification for requiring "something more" than what would be necessary to establish a tort is drawn from that amendment's reference to "punishments." In *Farmer v. Brennan*,[133] a transsexual prisoner claimed that defendant prison officials had violated his constitutional rights by failing to protect him from another inmate who had beat and raped him. Earlier decisions by the Court had held that a prisoner claiming a violation of the Eighth Amendment must establish that the defendant official acted with "deliberate indifference"[134] to a substantial risk of harm. The question in *Farmer* was whether "deliberate indifference," which had come to be equated with recklessness, should be interpreted according to a civil law approach, which holds a person responsible if he "fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known,"[135] or according to a criminal law approach, which "generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware."[136] Justice Souter, writing for the Court, rejected the tort approach in favor of the crimi-

131. *See id.* at 201-02 (citing RESTATEMENT (SECOND) OF TORTS §323 (1965) and other torts authorities). In tort law, the analysis would have turned on whether there was a "special relationship" between the plaintiff and the defendant or on whether the defendant had voluntarily undertaken to aid the plaintiff. Instead of trying to define an appropriate standard for government conduct, the parties and the Court spent much of their time trying to apply these tort concepts to the facts of this case.

132. *Id.* at 202.

133. 114 S. Ct. 1970, 1974-75 (1994).

134. Whitley v. Albers, 475 U.S. 312, 319-20 (1986). *Whitley* itself can be seen as an instance of tort-avoidance in that the Court stressed that the standard was necessary to make it clear that there would be no liability for ordinary acts of negligence. *See id.* at 319.

135. *Farmer*, 114 S. Ct. at 1978, (citing W. PAGE KEETON ET AL, PROSSER AND KEETON ON LAW OF TORTS § 34 (5th ed. 1984)); RESTATEMENT (SECOND) OF TORTS §500 (1965).

136. *Id.* at 1978-79.

nal law standard.[137] This result, while plausible as an interpretation of the Eighth Amendment, has the effect of creating a particularly formidable requirement that prisoners seeking to raise constitutional claims prove something "like tort but more egregious" because of the rule that all challenges to the treatment of convicted prisoners must be brought under that constitutional provision rather than under the Due Process Clause.[138] Here, categorization combines with "torts-plus" requirements to foreclose most substantive protection.

Prof. Wells' response to this dilemma, like the Court's, is substantive. He would reject the Court's "categorical approach" entirely and urges that all egregious invasions of personal security by government officials (those cases that he describes as falling on the border of constitutional law and torts) be treated under a single constitutional category — substantive due process. Wells criticizes the Court's reliance on tort concepts in *Paul v. Davis*,[139] yet his own analysis is driven by the "tort-like"[140] character of constitutional cases that involve injuries to personal security and by the existence of a compensatory damage remedy. Wells, like the Court, makes "substantive constitutional law *follow*[ ] the availability of damages."[141]

Prof. Wells does not make the mistake of adopting tort categories to analyze constitutional claims.[142] Nor does he make the mistake of *Paul v. Davis* by foreclosing constitutional inquiry altogether. But he does start with tort, and he tries to distinguish constitutional analysis from ordinary personal injury claims by adding "something more" to create the constitutional cause of action. That extra element is an "egregious" state of mind, evidence that power has been deliberately abused by a government official.[143] Under Prof. Wells' analysis the Constitution is not concerned with just any technical assault and battery, but only with those that are the product of improper motivation. And it is not concerned with just any failure to act or dereliction of duty, but only with a particularly callous indifference.

Wells' standard would include, by definition, the most outrageous abuses of governmental power, such as that before the Court in

137. *See id.*

138. *See e.g.*, Whitley v. Albers, 475 U.S. 312, 326-27 (1986).

139. *See* Wells, *supra* note 2, at 647.

140. *Id.* at 620.

141. *Id.*

142. *See supra* note 11 and accompanying text.

143. This is a requirement only for cases involving invasions of personal security, so it does not apply to claims based on procedural due process. *See* Wells, *supra* note 2, at 650 n.185.

Screws.[144] To that extent, his suggestion that substantive due process be taken seriously is a necessary corrective of the Court's position.[145] But in making a malicious state of mind necessary as well as sufficient, Wells forecloses the possibility that nonprocedural constitutional violations may exist independent of official malice. Abuse of government power is not always accompanied by a hostile mind. Certain intrusive practices that threaten personal injury or personal dignity—perhaps choke holds, or strip searches, or institutional crowding, or the routine exposure of nude inmates to the gaze of the opposite sex—might be quite consistent with an official's honest effort to do the job efficiently and effectively. An official's neutral, or even admirable, mental state ought not, in itself, be an insurmountable barrier to the claim that the Constitution has been violated. To return to my theme: The good faith of the official seems more relevant to the question of whether he or she should be personally held liable for damages—as indeed it once was under immunity doctrine[146]—than to whether the Constitution has been infringed.

The impulse to view constitutional cases as "torts-plus" follows naturally from Wells' focus on personal security. If analysis begins with the injury (personal security, especially if defined as physical well-being), rather than by focusing directly on abuse of power, the theoretical overlap between tort and constitutional law is quite real. The pull of the analogy from torts, then, encourages Wells to look for some way to narrow the category.

It is dangerous to define constitutional claims as a narrow subset of tort law because tort law has been particularly ineffective in dealing with precisely the sorts of interests and injuries that are at the center of constitutional law. To the extent that tort remedies address abuses of power, they do so purely fortuitously. The problem begins with the tort definition of redressable injury. Although dignitary claims have been recognized in actions for battery and reputation, torts has focused on physical injuries. Traditional tort doctrines have not developed mechanisms for vindicating interests in speech, belief, respect, or

144. *See supra* text accompanying notes 57-60.

145. *See also* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993).

146. The qualified immunity available to executive officials originally had both an objective and a subjective component. It could be lost by proof that the official acted in bad faith or that he had violated a settled constitutional right. *See* Wood v. Strickland, 420 U.S. 308 (1975). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court jettisoned the subjective element as too easily pled and too productive of litigation. Current law protects even malicious officials as long as they do not unreasonably ignore established law.

fair and equal treatment. Claims of gender and race discrimination or harassment can be brought only indirectly. Prof. Wells might respond that his recommendation addresses only those cases in which the plaintiff asserts an injury that is comparable to those traditionally redressable at tort.[147] But even here, tort law, which is not addressed specifically to government conduct except through the development of immunity doctrines that limit liability, does not fully capture the impact of official invasions. It may well be more frightening, more humiliating, to be subjected to a strip search by police officers, even when they are acting in good faith, than it is to be the victim of a private battery or imprisonment. Part of the additional injury may be due to gender or race inequalities, which play no explicit role in tort analysis. Part may be due to the very fact that the search is conducted under a good faith claim of right.

When dealing with questions of constitutional substance, it is as inappropriate to craft doctrine to react against tort as it is to adopt tort concepts to define wrongdoing. There is no more reason to think that constitutional actions should be defined as the most egregious cases carved out of the broader category of torts than there is to think that an official's tortious conduct creates a constitutional case. Although there are constitutional referents to interests defined by tort law, most clearly in the Due Process Clause, and understandings of tort responsibility undoubtedly informed the § 1983 drafters' understanding of what a compensatory statute would accomplish,[148] more open-ended appeals to tort are at best confusing. At worst, they divert attention from the fact that the Bill of Rights was specifically designed to do what that tort has been quite reluctant to do—to define the limits of government conduct.

That said, there are lessons of legal process that constitutional thinkers might learn from the history of torts. One lesson learned in the eighteenth and nineteenth centuries is that rigid categorical distinctions among causes of action are difficult to maintain and often unfair in practice. Another lesson, still in the process of being absorbed, is that theories that purport to subsume all actions into one overarching approach are more productive of academic insight than as

147. Wells does not intend to impose a state of mind requirement on First Amendment or procedural process cases. He does intend to capture many cases now thought of as raising Fourth Amendment and Eighth Amendment claims under substantive due process to the extent they involve invasions of personal security.

148. Because of this, decisions like *Wilson v. Garcia*, 471 U.S. 261 (1985) (applying statutes of limitations for personal injury actions to claims under §1983), are not vulnerable to the criticism I am making.

rules for deciding cases. The great strength of torts, grounded in the common law method, is that it has been able to build on the past because that past is not described too rigidly. Constitutional interpretation, it might be responded, is grounded on a text and is much less open to legislative correction, so greater rigidity is appropriate. Yet, our constitutional tradition has more in common with common law method than this response suggests. The cases that sort the constitutional claims into discrete categories sometimes talk as if the Framers had in mind a master plan that created the perfectly appropriate provision for every possible claim, a plan so precise that it drew, for example, distinctions based on whether the plaintiff is a free citizen, a convicted prisoner, or a pretrial detainee. There is no evidence that such a plan existed, and the courts never really refer to one. Instead, the categories emerge by application of the interpretive principle that the narrow and more specific provision preempts the more general.[149] That principle makes sense when one provision deals clearly and directly with the matter before the Court. Applied to cases on the periphery of several constitutional provisions, it, too, is a construct with little basis in history. The Court can seldom point to a specific desire by the drafters of any particular provision to cut back on the reach of another. In some instances, such as the relationship between the Fourteenth Amendment and the Eighth Amendment, the more general provision follows the more specific. The text of the Constitution was a political creation, and we have evolved an interpretive tradition that respects its open texture. The Court's attempt to treat the Constitution as a series of mutually exclusive delineation of rights, like Wells' effort to subsume a wide variety of claims under substantive due process, may have been conceived as a way of bringing coherence to the field of constitutional litigation. Because of its rigidity and because it is used so much more often to dismiss claims than to recognize them, the Court's approach seems instead to be driven by the bald policy to discourage the assertion of constitutional rights. This is an abdication of responsibility rather than judicial restraint.

V

The hardest cases for the Court—the cases where the overlap with "ordinary torts" seems most troublesome and the threat of extensive liability most severe—are the cases of official mistake. These were the most powerful of Chief Justice Rehnquist's examples in *Paul*

149. *See, e.g.*, Graham v. Connor. 490 U.S. 386 (1989).

v. Davis, where he worried about liability for "an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle."[150] Case of mistake are also most difficult for Prof. Wells; he defines some of them, those brought under the Fourth Amendment or procedural due process, as beyond the reach of his paper[151] and excludes the rest from constitutional protection by his proposed requirement that constitutional plaintiffs establish bad faith in order to recover.

I would not be so quick to put negligent government behavior beyond constitutional reach. Another of Chief Justice Rehnquist's examples in *Paul* raises the possibility of official liability to "a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace."[152] If the officers made the announcement knowing that the plaintiff was innocent, Professor Wells, if not Justice Rehnquist, would hold them responsible. But is it so obvious that the Constitution would not be violated by their good faith, but mistaken, evaluation of the evidence supporting the public statement? In such a situation, the arrest would be held unconstitutional for lack of probable cause.[153] Why not the officials' statement too? In exclusionary rule cases, the Court has distinguished between a conclusion that the Fourth or Fifth Amendment has been violated and the application of the remedy excluding the evidence. Where police officers act in good faith, the exclusion may be admitted even if the Constitution has been violated.[154] In my hypothetical case, too, lack of bad faith may affect remedies and support an immunity for the officers, without also calling into question the constitutional standard for police conduct.

Prof. Wells may agree with my analysis of the negligent accusation on the grounds that the claim it raises is properly one of due process. Let us turn to another of Chief Justice Rehnquist's examples, that of the innocent bystander shot by the police.[155] Should we dismiss out of hand the possibility that there may be constitutional constraints on police officers' use of firearms in ways that threaten

150. 424 U.S. 693, 698 (1976).

151. *See* Wells, *supra* note 2, at 619-20. One consequence of his standard is that excessive force cases such as *Graham v. Connor*, 490 U.S. 386 (1989), will be decided under a subjective, rather than an objective, standard. *See id.*

152. 424 U.S. at 698.

153. Nathanson v. United States, 290 U.S. 41 (1933).

154. United States v. Leon, 468 U.S. 897 (1984).

155. *Paul*, 424 U.S. at 698.

innocent people? The authority to use guns in such a risky fashion is a government power that can be abused by negligent and reckless, as well as by intentional, behavior. The case of the negligently driven government vehicle seems most easy to me. In the absence of evidence that the accident involved an abuse of uniquely governmental power, perhaps because it came at the conclusion of a high-speed chase,[156] there is no reason to characterize this as a constitutional case.

If damage remedies are made unavailable where good faith exists, what would be the point of insisting that the Constitution might still have been violated? Once we put aside situations that appear to be analogous to torts, the most serious problem with defining constitutional substance with reference to torts becomes clear: whether the analogy is to intentional torts, to egregiously callous dereliction of duty, or to ordinary negligence, the comparison to torts casts the dispute as an isolated injury inflicted by one individual upon another.[157] This strikes me as being exactly backward. It is certainly appropriate to be concerned about compensation for the victims of official lawlessness. But what is special about constitutional law, and distinguishes it from tort, is its concern with institutional power, and therefore with systemic injustice.[158] Trust in authority can be lost through neglect and honest misunderstanding as well as through deliberate wrongdoing. Despite the Court's reluctance,[159] there should be mechanisms for articulating and reinforcing constitutional limits on government behavior that do not depend on the existence of a "bad actor" with a malicious state of mind. One possibility would be to bring suit against

156. A constitutional claim may arise if the government has exercised sovereign immunity to give itself protection from ordinary tort liability. A government does exercise unique power when it protects itself from liability by mechanisms unavailable to others. Whether exercising sovereign immunity in this way is an abuse of power that violates the Constitution has not been expressly answered by the Supreme Court. Justice Stevens, the only Justice to reach the question in *Davidson v. Cannon*, decided that a state policy that defeats recovery is not, it itself, unconstitutional. Daniels v. Williams, 474 U.S. 327, 336, 342 (1986) (Stevens, J., concurring in the judgments in *Daniels* and *Davidson*).

157. Obviously, many tort actions involve multiple plaintiffs and/or multiple defendants, but determination of causation, the calculation of damages, and even the standard of care are highly individualized. Both intentional torts and negligence actions evaluate conduct with reference to real or hypothetical individual actors; institutions are held liable, under respondeat superior, for the errors of their employees. Only strict liability departs from this paradigm.

158. *See* Fallon, *supra* note 145.

159. *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976).

a government entity, rather than an official.[160] Another possibility would be to seek injunctive or declarative relief.[161]

Perhaps the Court has been so reluctant to encourage "constitutional tort" suits precisely because they address isolated and particular governmental errors rather than systemic wrongs. Litigation that seeks widespread social change by challenging generally applicable laws or common practices—cases like *Brown v. Board of Education*[162] or *Baker v. Carr*[163]—seems more obviously to be the work of constitutional law. *Monroe v. Pape*,[164] which on its face only involved one incident and one family in one city on one night, represents the opposite extreme. Yet too much can be made of this distinction. When there are no judicial mechanisms to impose sanctions on isolated incidents of the sort that occurred in *Monroe*, similar incidents can accumulate and become intrinsic to the functioning of the law enforcement system without any formal articulation of policy. That can create systemic injustice even when there is no bad faith, but it is a particularly serious problem when the individual officials are malicious or callous. Permitting damage actions based on evidence of egregious misconduct by individual officers addresses the problem. If damages actions are to be constrained in order to protect the public fisc or the resources of individual officials, constitutional claimants ought to be able to use other, equitable remedies to capture those cases in which unconstitutional conduct poses a recurring problem.

Injunctions preceded damages as constitutional remedies.[165] Although this reverses their relative priority in nonconstitutional cases, it is not just an ironic historical accident, but an indication of which is the more appropriate tool for rectifying systemic harm. The Constitution should be more concerned with ensuring that government is committed to proper practices than ensuring that no mistakes are made. The latter goal cannot be achieved. If constitutional litigation is, as the Court appears to believe, a powerful tool that ought to be used sparingly, its primary focus should be systemic unconstitutionality. It is more important that government actors be given guidance

160. Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986).

161. Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980).

162. 349 U.S. 294 (1955).

163. 369 U.S. 186 (1962).

164. 365 U.S. 167, 167 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

165. *Ex parte Young*, 209 U.S. 123 (1908), preceded *Monroe* by over 50 years.

as to the proper limits of their use of power than that every individual wrong be compensated by federal law.

By stressing the importance of preserving remedies for systemic conduct I do not mean to endorse the distinction that the Court has drawn between "established state procedures" and individual officials' "random and unauthorized conduct."[166] This distinction may have appealed to the Court because it purports to address government practices that have the widest impact. It also responds to the worry, triggered by *Monroe*, that §1983, if interpreted broadly, will lead to expensive litigation and an award of damages every time a government official makes a mistake. However, it is one more example of using constitutional substance, here an interpretation of Due Process, to deal with a problem of remedy. Moreover, systemic unconstitutionalities are not confined to established state procedures. The distinction is insensitive to the way in which organized power can be abused through unarticulated practices and through the toleration of (or failure to pay attention to) a series of isolated incidents, even when formally constitutional policies are in place. Sometimes the abuse of power occurs because of the malice or bad faith of a government official. At other times, as the Court has recognized in many cases under the Fourth and Fifth Amendments, it exists because government actors have failed to conform to objective rules of behavior that should be observed in recurring confrontations between officials and the public. A substantive due process approach of the sort Prof. Wells suggests, one that focuses on the individual official's state of mind, will reach the worst examples of abuse of power, but it does not capture all these cases.

The Supreme Court has made it particularly difficult to obtain injunctive relief against practices that are not rooted in formal policy, yet randomly injure large numbers of individuals. Plaintiffs who seek to challenge these practices have failed because they cannot establish that they will be subject to them in the future even if they have been in the past[167] and because it is difficult to persuade the Court that something as tangible as a practice really exists.[168] An appropriate way to respect the distinction between constitution and tort would be to give equitable relief more freely in response to claims of this sort. But, given the Court's reluctance to do this, the distinction between

166. *See supra* notes 34-35 and accompanying text.
167. *See* Los Angeles v. Lyons, 461 U.S. 95 (1983).
168. *See* Rizzo v. Goode, 423 U.S. 362 (1976).

established procedures and isolated unauthorized actions is especially pernicious because it forecloses all relief. If the proof standards for injunctions are to be placed so high, damage actions are the only means of reaching those situations where abuse occurs in practice despite the existence of formally constitutional policies. Damage relief becomes important, not because every official mistake should be corrected, or even because every violation of the Constitution should be remedied, but because, without the right to sue for compensation, certain sorts of abuse of power will entirely escape judicial scrutiny.